K SILADASS v. CIMB BANK BHD

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
LIM YEE LAN JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: W-02(IM) (NCVC)-1362-08-2014]
17 JUNE 2015

CIVIL PROCEDURE: *Third party proceedings – Contribution from third party – Opening of fraudulent accounts – Misappropriation of monies by unknown persons – Appellant as partner of legal firm suffered losses due to bank's negligence – Numerous suits filed and judgments obtained against firm for breach of fiduciary duty – Whether firm through its partners commenced third party proceedings against bank – Whether payment to settle plaintiff's claim made without admission of liability – Whether appellant entitled to seek contribution from bank as joint tortfeasor – Whether liability under third party proceedings could only arise where there was specific finding of liability between plaintiff and appellant – Whether judgment against bank allowed – Civil Law Act 1956, s. 10(1)(c)*

TORT: *Damages – Joint tortfeasors – Third party proceedings – Claim against third party bank as another or joint tortfeasor – Whether third party bank found to be negligent – Whether accountable in damages for losses suffered – Civil Law Act 1956, s. 10(1)(c)*

In the High Court, there were two defendants, namely, the appellant and one Azlinda Zakaria. Both were partners in a legal firm known as K Siladass & Partners ('the firm'). In or around July 2006, the managing clerk of the appellant's Petaling Jaya branch absconded. Subsequently, it was discovered that two unknown persons had wrongfully opened unauthorised accounts with CIMB Bank Bhd in the name of the firm. These unknown persons had also proceeded to operate these accounts, using funds transmitted to the legal firm by clients. CIMB Bank Bhd was the third party in the suit before the High Court and the respondent in this appeal. It was discovered that the signature of a former partner of the legal firm and that of the appellant had been forged in order to procure the opening of these fraudulent accounts. In consequence, the legal firm suffered losses in that monies lawfully due to the firm were deposited into the fraudulent accounts. Further, numerous suits were preferred against the firm and judgments were obtained against it for breach of fiduciary duty when monies meant to be held by the firm as stakeholders for the benefit of clients and third parties were misappropriated. In each action against the firm, a third party proceeding against CIMB Bank Bhd would be commenced as well. On 23 November 2007, the firm commenced an action against the respondent ('the 1353 suit') and sought damages for losses suffered which arose from the transactions in the fraudulent accounts. The firm effectively sought to be indemnified by CIMB Bank Bhd, against all claims which arose against it as a result of the unlawful

A and/or negligent opening and operation of the fraudulent accounts. On 31 October 2008, the plaintiff in the suit giving rise to this appeal, *ie*, The Bank of Nova Scotia Bhd ('the plaintiff'), commenced an action in the High Court ('the Nova Scotia suit') and claimed for the sum of RM360,000 that was released to the firm to be held as stakeholders in respect of a loan
B granted to one Chin Zee Ling. By way of defence, the appellant who was the defendant in that suit denied the deposit of the said sum into the firm's account and maintained that they did not have any knowledge about it. In light of this fact, third party proceedings ('the first third party proceedings') were commenced against the respondent ('the respondent third
C party bank'). On 5 June 2013, the plaintiff, the appellant and one other, *ie*, the borrower in the borrower's suit entered a consent judgment in the consolidated suit which comprised of the borrower's suit and the Nova Scotia suit. The terms of the consent judgment were that the parties to the Nova Scotia suit and the borrower's suit had agreed to resolve their respective claims by way of a payment for the sum of RM145,000 as full and
D final settlement. The appellant resolved the plaintiff's claim by paying the sum in full and final settlement of the plaintiff's debt. As for suit 1353, the matter proceeded to trial and the legal firm's claim against the respondent third party bank was allowed. As such, the bank was found to be liable for negligence in respect of the opening of the fraudulent accounts. As a
E consequence of the settlement, the plaintiff withdrew its claim against the appellant. The appellant, however, sought to maintain and prosecute its third party claim. In respect of an application made under O. 14A of the Rules of Court 2012, the High Court Judge concluded that the appellant could no longer sustain its claim against the third party since the plaintiff had
F withdrawn its claim against the appellant. Hence, this appeal. K Siladass prosecuted this appeal in his capacity as the partner of the firm. The issues that arose for consideration, *inter alia*, were (i) whether the appellant was entitled to pursue the second third party proceedings after having entered into a consent judgment with the plaintiff by paying the sum of RM125,000
G without any admission of liability; and (ii) whether liability under third party proceedings could only arise and was confined solely to situations where there was a specific finding of liability between the plaintiff and the appellant (qua defendant).

Held (allowing appeal with costs)

H **Per Nallini Pathmanathan JCA delivering the judgment of the court:**

(1) Third party proceedings are the adjectival or procedural "vehicle", as it were, that enables a defendant in a suit brought against it by a plaintiff, to seek contribution from a third party who had contributed to, or caused such liability to arise as between the plaintiff and the defendant.
I The substantive provisions allowing for such a contribution or third party claim can arise both in contract and in tort. In the instant case, the allegation by the appellant against the respondent third party bank is

premised on negligence. The appellant sought contribution in terms of damages from the respondent third party bank, as another or joint tortfeasor. The substantive provisions in law in relation to contribution by joint tortfeasors is to be found in s. 10(1)(c) of the Civil Law Act 1956. (para 11)

(2) The appellant did not only settle the matter by paying out a sum of RM125,000 to the plaintiff but entered a consent judgment to that effect. The only anomaly as it were, was the appellant's insistence that the payment was without an admission of liability. However, that did not detract from the fact that the appellant effectively accepted responsibility in law for the losses suffered by the plaintiff and made good that loss to the extent of RM125,000. He was effectively liable or responsible in law to the plaintiff in that sum of money. Having accepted such responsibility in law, he was entitled to seek contribution from the respondent third party bank who was another or joint tortfeasor. This was borne out by the decision in suit 1353 where another judge of the High Court found the respondent third party bank negligent and therefore, accountable in damages for all losses suffered by the appellant as a partner of the legal firm. (paras 19 & 20)

(3) The appellant's claim emanating from the second third party proceedings was not extinguished by the settlement reached between the plaintiff and the appellant (qua defendant). As a consequence, the appellant was entitled to, and was therefore duly granted judgment against the respondent third party bank in terms of the prayers in their third party notice. (paras 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, terdapat dua defendan, iaitu, perayu dan seorang bernama Azlinda Zakaria. Mereka merupakan rakan kongsi firma guaman yang dikenali sebagai K Siladass & Partners ('firma'). Pada atau sekitar Julai 2006, kerani di cawangan firma perayu yang terletak di Petaling Jaya telah melarikan diri. Adalah didapati bahawa terdapat dua orang yang tidak dikenali telah membuka akaun secara salah tanpa kebenaran di CIMB Bank Bhd dengan menggunakan nama firma. Orang-orang yang tidak dikenali ini telah mengendalikan akaun-akaun ini, dengan menggunakan dana yang disalurkan kepada firma oleh anak guamnya. CIMB Bank Bhd merupakan pihak ketiga dalam tindakan di Mahkamah Tinggi dan responden di dalam rayuan ini. Didapati bahawa tandatangan bekas rakan kongsi firma dan perayu telah dipalsukan untuk membuka akaun-akaun tersebut. Akibatnya, firma mengalami kerugian di mana wang firma telah dimasukkan ke dalam akaun frod tersebut. Beberapa tindakan diambil terhadap firma dan penghakiman telah diperolehi terhadap firma bagi kemungkiran kewajipan fidusiari apabila wang yang sepatutnya dipegang oleh firma sebagai pemegang amanah untuk anakguamnya dan pihak ketiga telah disalahguna. Dalam

A setiap tindakan terhadap firma, prosiding pihak ketiga terhadap CIMB Bank Bhd juga telah diambil. Pada 23 November 2007, firma telah mengambil tindakan terhadap responden ('guaman 1353') dan menuntut kerosakan dan kerugian yang berbangkit daripada transaksi dalam akaun frod tersebut. Firma telah memohon supaya CIMB Bank Bhd membayar ganti rugi terhadap
B segala tuntutan yang berbangkit akibat pembukaan dan pengendalian akaun-akaun yang tidak sah tersebut. Pada 31 Oktober 2008, plaintif di dalam tindakan yang menyebabkan wujudnya rayuan ini, iaitu, The Bank of Nova Scotia Bhd ('plaintif'), telah memulakan tindakan di Mahkamah Tinggi ('tindakan Nova Scotia') dan menuntut jumlah RM360,000 yang dikeluarkan
C kepada firma untuk dipegang sebagai pemegang amanah bagi pinjaman yang diberi kepada satu Chin Zee Ling. Perayu yang merupakan defendan di dalam tindakan tersebut telah menafikan bahawa wang tersebut telah dimasukkan ke dalam akaun firma dan menegaskan bahawa mereka tidak mempunyai sebarang pengetahuan berkenaan perkara tersebut. Dalam keadaan ini, prosiding pihak ketiga ('prosiding pihak ketiga pertama') telah
D dimulakan terhadap responden ('responden bank pihak ketiga'). Pada 5 Jun 2013, plaintif, perayu dan seorang lagi, iaitu, peminjam di dalam tuntutan peminjam telah memasuki penghakiman persetujuan di dalam tindakan yang telah digabungkan yang merangkumi tindakan peminjam dan Nova Scotia. Terma penghakiman persetujuan adalah di mana pihak-pihak di dalam
E tindakan Nova Scotia dan tindakan peminjam telah bersetuju untuk menyelesaikan tuntutan-tuntutan mereka masing-masing melalui bayaran untuk jumlah RM145,000 sebagai bayaran penuh dan muktamad. Perayu telah menyelesaikan tuntutan plaintif dengan membayar jumlah tersebut. Bagi tindakan 1353, tuntutan firma terhadap responden bank pihak ketiga
F telah dibenarkan. Oleh itu, bank didapati cuai bagi pembukaan akaun-akaun berunsur frod tersebut. Sebagai akibat penyelesaian di antara perayu dan plaintif, plaintif telah menarik balik tuntutannya terhadap perayu. Perayu, walau bagaimanapun, memohon untuk mengekalkan dan mengambil tindakan terhadap tuntutan pihak ketiga. Berkenaan permohonan yang dibuat
G di bawah A. 14A Kaedah-Kaedah Mahkamah 2012, Hakim Mahkamah Tinggi memutuskan bahawa perayu tidak boleh meneruskan tuntutannya terhadap pihak ketiga memandangkan plaintif telah menarik balik tuntutannya terhadap perayu. Oleh itu, rayuan ini. K Siladass memfailkan rayuan ini dalam kapasiti beliau sebagai rakan kongsi firma itu. Isu-isu yang dibangkitkan untuk pertimbangan, antara lain, adalah (i) sama ada perayu
H boleh meneruskan prosiding kedua pihak ketiga selepas memasuki penghakiman persetujuan dengan plaintif dengan membayar jumlah sebanyak RM125,000 tanpa mengaku liabiliti; dan (ii) sama ada liabiliti di bawah prosiding pihak ketiga hanya boleh berbangkit dan terhad kepada keadaan di mana terdapatnya penemuan liabiliti di antara plaintif dan perayu
I (qua defendan).

Diputuskan (membenarkan rayuan dengan kos)
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Prosiding pihak ketiga merupakan pengangkutan "adjectival" atau berprosedur yang membolehkan defendan dalam suatu guaman yang difailkan terhadapnya oleh plaintif, untuk memperolehi sumbangan daripada pihak ketiga yang telah menyumbang atau menyebabkan liabiliti sebegitu berbangkit di antara plaintif dan defendan. Peruntukan substantif yang membenarkan pampasan atau tuntutan pihak ketiga boleh berbangkit dalam kontrak dan tort. Dalam kes ini, tuduhan perayu terhadap responden bank pihak ketiga adalah berdasarkan kecuaian. Perayu memohon sumbangan dari segi kerugian daripada responden bank pihak ketiga, sebagai satu lagi atau tortfeasor bersama. Peruntukan substantif undang-undang berkenaan sumbangan oleh tortfeasor bersama boleh didapati di bawah s. 10(1)(c) Akta Undang-Undang Sivil 1956.

(2) Perayu bukan sahaja menyelesaikan perkara ini dengan membayar wang sejumlah RM125,000 kepada plaintif malah telah memasuki penghakiman persetujuan untuk memberi kesan terhadapnya. Satu-satunya kejanggalan di sini merupakan desakan perayu bahawa bayaran dibuat tanpa mengaku liabilitinya. Walau bagaimanapun, perkara ini tidak menafikan fakta bahawa perayu telah menerima tanggungjawab di bawah undang-undang bagi kerugian yang dialami oleh plaintif dan membayar RM125,000. Beliau bertanggungjawab ke atas wang tersebut. Dengan menerima tanggungjawab sebegitu di bawah undang-undang, beliau layak untuk menuntut sumbangan daripada responden bank pihak ketiga yang merupakan satu lagi atau tortfeasor bersama. Perkara ini dibuktikan oleh keputusan dalam guaman 1353 di mana hakim lain Mahkamah Tinggi mendapati responden bank pihak ketiga cuai dan oleh itu, bertanggungjawab bagi kesemua kerugian yang dialami oleh perayu sebagai rakan kongsi firma itu.

(3) Tuntutan perayu yang berpunca daripada prosiding kedua pihak ketiga tidak diluputkan melalui penyelesaian yang dicapai di antara plaintif dan perayu (qua defendan). Sebagai akibatnya, perayu layak dan oleh itu, diberi penghakiman terhadap responden bank pihak ketiga berdasarkan tuntutan di dalam notis pihak ketiga.

Case(s) referred to:
Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC ***(refd)***
Stott v. West Yorkshire Road Car Co Ltd and Home Bakeries Ltd and Another [1971] 2 QB 651 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 10(1)(c)
Rules of Court 2012, O. 14A, O. 33

Law Reform (Married Women and Tortfeasors) Act 1935 [UK], s. 6(1)(c)

A *For the appellant - Prakash Lachimanan (Geetha Supramaniam with him); M/s Supramaniam & Partners*
For the respondent - Arham Rahimy Hariri; M/s Azim, Tunku Farik & Wong

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 22 NCVC-282-03-2013]

B *Reported by Kumitha Abd Majid*

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

C **[1]** The primary issue of law, which arose for consideration in this appeal, was whether a third party claim by a defendant, stands extinguished by reason of the defendant resolving the claim between itself and the plaintiff. In the instant case, the defendant had resolved the plaintiff's claim by paying a sum of money in full and final settlement of the plaintiff's debt.

D **[2]** As a consequence of such settlement, the plaintiff withdrew its claim against the defendant. The defendant however, sought to maintain and prosecute its third party claim.

[3] The specific question that was determined in the High Court, by way E of an application under O. 14A of the Rules of Court 2012, was whether the defendant's third party claim was sustainable in light of the withdrawal of the action by the plaintiff against, *inter alia*, the defendant.

[4] The learned judge concluded that the defendant could no longer sustain its claim against the third party, by reason of the plaintiff having withdrawn F its claim against the defendant. It is against this decision that the defendant, who is the appellant here, founded his appeal.

[5] On 24 November 2014, this appeal was heard and allowed. We determined that the appellant's third party claim against the respondent was in fact sustainable notwithstanding the resolution and subsequent withdrawal G by the plaintiff of its action against the appellant who was the defendant in the court below. It followed as a consequence of this determination that the appellant is entitled to judgment against the respondent third party. As such, we set aside the decision of the High Court in relation to this question only and awarded costs to the appellant. The full reasons for our decision are as H set out below.

Salient Facts

[6] The largely undisputed, although somewhat convoluted facts have been comprehensively set out in both the judgment of the High Court and the I submissions of the appellant, which we adopt:

(i) in the High Court there were two defendants, namely the appellant and one Azlinda bte Zakaria, both partners in a legal firm known as K Siladass & Partners. In this appeal, only K Siladass prosecutes this appeal in his capacity as the partner of the firm of K Siladass & Partners. A branch of the partnership, namely the Petaling Jaya branch was opened on 14 April 1994 and ceased operations on 31 March 2007.

(ii) in or around July 2006, the managing clerk of the appellant's Petaling Jaya branch absconded. It was discovered subsequently that two unknown persons had wrongfully opened unauthorised accounts with CIMB Bank Berhad in the name of the firm. These unknown persons had also proceeded to operate these accounts, using funds transmitted to the legal firm by clients. CIMB Bank Berhad was the third party in the suit before the High Court, and the respondent in this appeal.

(iii) it was discovered that the signature of a former partner of the legal firm and that of the appellant had been forged in order to procure the opening of these fraudulent accounts. As a consequence of these events, the legal firm suffered loss, in that monies lawfully due to the firm were deposited into the fraudulent accounts, and then misappropriated by persons having control of those fraudulent accounts.

(iv) monies meant to be held by the legal firm as stakeholders for the benefit of clients and third parties were also deposited into the fraudulent accounts. These monies were also misappropriated. As a consequence, numerous suits were preferred against the firm and judgments obtained against it for breach of fiduciary duty.

(v) in each action against the firm arising from monies lost as a consequence of having been deposited into the fraudulent accounts, the firm, through its partners, commenced third party proceedings against CIMB Bank Berhad seeking to be indemnified.

(vi) on 23 November 2007, the firm commenced an action against the respondent third party bank *vide* Kuala Lumpur High Court Suit No. 22-1353-2007 ('the 1353 suit') seeking damages for losses suffered arising from the transactions in the fraudulent accounts. The firm effectively sought to be indemnified by CIMB Bank Berhad, against all claims arising against it as a result of the unlawful and/or negligent opening and operation of the fraudulent accounts.

(vii) on 31 October 2008, the plaintiff in the suit giving rise to this appeal, namely The Bank of Nova Scotia Berhad, commenced an action in the Kuala Lumpur High Court *vide* Civil Suit No. 22NCVC-282-03-2013 ('the Nova Scotia suit') claiming, *inter alia*, a sum of RM360,000 that was released to the firm to be held as stakeholders in respect of a loan granted to one Chin Zee Ling.

(viii) the Bank of Nova Scotia Berhad ('the plaintiff') alleged that the sum of RM360,000 had been released to the firm (*vide* cheque number 141452) and the monies were to be utilised to discharge an existing charge held by CIMB Bank Berhad and the balance released to the vendor. By way of defence, the appellant who was the defendant denied the deposit of the said sum into the firm's account and maintained no knowledge of the same. Third party proceedings ('the first third party proceedings') were commenced against CIMB Bank Berhad ('the respondent third party bank').

(ix) at the material time, the appellant and the second defendant (who was also a partner in the legal firm) were not able to reconcile from the bank statements issued in relation to the fraudulent accounts whether the plaintiff's cheque in the sum of RM360,000 had in fact been deposited into the second fraudulent account on 31 December 2002 as the only transaction recorded for that period was a deposit of RM360,500.

(x) accordingly, the appellant and the second defendant as partners of the legal firm, asked the respondent third party bank to clarify the transaction appearing in the fraudulent account and to provide a written explanation and a copy of the cheque image relating to the sole entry of RM360,500 on 31 December 2002. Pending the receipt of an explanation from the respondent third party bank, the first third party proceedings were withdrawn with liberty to file afresh on 2 July 2012.

(xi) on 22 October 2012, the respondent third party bank serve comment as agreed replied confirming that the transaction on 31 December 2002 was indeed the deposit of the plaintiff's cheque number 141452 for the sum of RM360,000.

(xii) prior to the receipt of this letter from the respondent third party bank however, the Nova Scotia suit had been transferred to the High Court to be heard together with another civil suit namely 24NCVC-1682-07/2012 ('the borrower's suit').

(xiii) pursuant to the reply from the respondent third party bank, the appellant (and the second defendant) sought and obtained leave from the High Court on 8 May 2013 to issue a second third party notice in the consolidated suit, seeking an indemnity against the respondent third party bank in respect of the plaintiff's (ie, The Bank of Nova Scotia's) claim.

(xiv) on 5 June 2013, the plaintiff and the appellant and one other, namely the borrower in the borrower's suit, entered a consent judgment in the consolidated suit (comprising the borrower's suit and the Nova Scotia suit). The terms of the consent judgment were that the parties to the Nova Scotia suit and the borrower's suit had agreed to resolve their

respective claims by way of a payment of the sum of RM145,000 in full and final settlement of those claims. The sum of RM145,000 was paid by the appellant and the borrower in the sums of RM125,000 and RM20,000 respectively.

(xv) as for suit 1353, namely the suit where the legal firm of K Siladass and Partners had sued CIMB Bank Berhad in negligence – the matter proceeded to trial and the legal firm's claim against the respondent third party bank was allowed. In other words CIMB Bank Berhad, namely the respondent third party bank in the subject appeal was found to be liable in negligence to, *inter alia*, the appellant in respect of the opening of the fraudulent accounts. As such, the respondent third party bank in the 1353 suit was held to be liable to indemnify the appellant in his capacity as the partner of the legal firm in respect of losses arising from such negligence.

The Question For Determination In The High Court In Relation To The Second Third Party Proceedings

(xvi) notwithstanding the resolution of the consolidated suit matters as between the plaintiff, the appellant and the borrower, it will be recalled that the second third party proceedings between the appellant and the respondent third party bank remained alive.

It is in the context of these second third party proceedings between the appellant (ie, the defendant in the court below) and the respondent third party bank that the appellant filed an application under O. 14A and/or O. 33 of the Rules of the High Court 2012, seeking that the following issue be determined or tried as a preliminary issue:

> i. whether the 1st Defendant's (i.e. the appellant's) third party claim is sustainable in the light of the withdrawal of the action by the plaintiff against the defendants.

Put another way, the issue was whether the appellant could continue to prosecute its second third party proceedings against the respondent third party bank in light of the fact that the plaintiff, namely The Nova Scotia Bank, had settled the matter with the appellant.

(xvii) several other questions were also put forward before the court but they are all, save for one question, neither disputed nor relevant, for the purposes of this appeal. Of sole relevance is this one issue, ie, whether the findings in suit 1353, namely that the respondent third party bank had been found to be negligent, were binding in relation to the second third party proceedings between the appellant and the respondent third party bank in the present suit. This question assumed significance because it effectively put an end to the need for a trial between the appellant and the third party.

(xviii) in other words, provided that there was a subsisting claim between the appellant and the respondent third party bank *vide* the second third party proceedings, the issue of liability was effectively settled by reason of the binding nature of the findings made in suit 1353. The learned judge in the court below agreed that the findings in suit 1353 would be binding in the event of the subsistence of a sustainable claim between the appellant and the respondent third party bank. However, in view of her earlier finding that such a third party claim was no longer maintainable by reason of the plaintiff's withdrawal of its suit against the appellant, this secondary issue of liability under the second third party claim became redundant.

The Appeal

(xix) as stated at the outset, we disagreed with the finding by the learned judge that the second third party proceedings were extinguished by reason of the resolution of the primary claim between the plaintiff, the appellant and the borrower. Given the binding nature of the findings in suit 1353, in respect of which there is no dispute, we accordingly concluded that the appellant was entitled to judgment against the respondent third party bank, subject to the final determination of liability in suit number 22-1353-2007.

The Decision Of The High Court

[7] The learned judge in the court below determined that the appellant was not entitled to proceed to prosecute its third party claim against the respondent third party bank premised primarily on the relief sought by the appellant against the respondent third party bank:

> (a) Bahawa Defendan pertama (ie, the appellant) berhak untuk di tanggungi dan/atau menuntut sumbangan daripada CIMB Bank (the respondent third party bank) di atas tuntutan Plaintiff (the Bank of Nova Scotia's claim) dan kos tuntutan.

[8] The learned judge concluded that the "fate" of the appellant's third party claim was directly linked and subject to, and hinges on the success of the plaintiff's main claim against the appellant. In view of the settlement as contained in the consent judgment which resulted in the plaintiff (ie, The Nova Scotia Bank) withdrawing its action against the appellant, it was determined by the High Court that the appellant's claim against the respondent third party bank was simply no longer sustainable. The rationale put forward was that upon withdrawal of the plaintiff's claim, such claim stood extinguished. As the claim by the plaintiff against the appellant no longer subsisted, the learned judge decided that the appellant could not maintain his claim against the respondent third party bank.

[9] The fact that the issue of liability was not determined in the consent judgment contributed to the learned judge's decision that the second third party proceedings were no longer sustainable. Her Ladyship concluded that the appellant could only proceed against the third party if it was decided by the High Court in the main claim that the appellant is liable to the plaintiff. There was therefore no basis for the appellant's claim for an indemnity from the respondent third party bank.

Reasons For Our Decision

[10] The primary question for our determination was whether the appellant was entitled to pursue the second third party proceedings after having agreed to enter a consent judgment with the plaintiff by paying the sum of RM125,000 without any admission of liability. This in turn warranted a consideration of the question whether liability under third party proceedings could only arise and was confined solely to situations where there was a specific finding of liability as between the plaintiff and the defendant, or whether such liability could and did extend to situations where the primary dispute between the plaintiff and the defendant had been resolved amicably by way of settlement with no finding of liability, or by way of a consent judgment.

[11] The starting point for this issue must be a consideration of the nature of a third party proceeding. Third party proceedings are the adjectival or procedural 'vehicle', as it were, that enables a defendant in a suit brought against it by a plaintiff, to seek contribution from a third party who has contributed to, or caused such liability to arise as between the plaintiff and the defendant. The substantive provisions allowing for such a contribution or third party claim can arise both in contract and in tort. In the instant case, the allegation by the appellant against the respondent third party bank is premised on negligence. The appellant essentially seeks a contribution in terms of damages from the respondent third party bank, as another or joint tortfeasor. The substantive provisions in law in relation to contribution by joint tortfeasors is to be found in s. 10(1)(c) of the Civil Law Act 1956. It provides as follows:

> … where damage is suffered by any person as a result of a tort, any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued, have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

Of relevance in the construction of this section is the Supreme court case of *Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98; [1989] 1 MLJ 226 ('*Mat Abu*'s case') where Hashim Yeop Sani CJ (Malaya) held, *inter alia*, as follows:

> In our opinion the answer to the appeal before us lies in ascertaining the true object of s. 10(1)(c) of our Civil Law Act. Like its English predecessor the provision gives a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage.
>
> We also do not think that a proceeding under O. 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.
>
> Third party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. **When a defendant is made liable to the plaintiff** he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party … (at p. 228 RHC D-F; emphasis added)

Two salient points may be gleaned:

(a) Third party proceedings are independent of and separate from proceedings by a plaintiff against a defendant;

(b) A defendant's right to prosecute a third party claim arises when he is made 'liable' to the plaintiff.

[12] In the court below, the learned judge concluded that as there was no finding of 'liability' by way of a judgment against the appellant (qua defendant), he enjoyed no right to claim an indemnity from the respondent third party bank as tortfeasor, for damages. The learned judge was also of the view, contrary to the foregoing passage in *Mat Abu*'s case that third party proceedings are not independent but instead, hinge upon, and are entirely dependent upon an express finding of liability between a plaintiff and a defendant.

[13] Is it then correct to say that third party proceedings can only be founded upon a finding of liability against the defendant in the primary suit between the plaintiff and the defendant? This in turn begs the question of what meaning is to be accorded to the term 'liable'? Is the term confined solely to a situation where a party is 'held liable by judgment' or is it to be accorded a wider connotation, so as to extend to a situation where a claim between the plaintiff and defendant has been settled by the payment of monies?

[14] This issue was considered in the English Court of Appeal decision of *Stott v. West Yorkshire Road Car Co Ltd and Home Bakeries Ltd and Another* [1971] 2 QB 651. The case involved a road traffic collision between a motorcycle (the plaintiff), an oncoming bus (the defendants) and a parked van (the third party). The plaintiff who was injured in the accident brought an action against the defendants. The defendants in turn brought third party proceedings against the parked van, seeking contribution. Third party directions were given under which the third party issue was to be decided immediately after the main action.

[15] However, by a settlement in writing, the plaintiff accepted a sum of money in discharge of his claim against the defendants and acknowledged that it was made without any contribution by the third parties. The settlement was also "without any admission of liability" by the defendants. Upon the registrar ordering that the third party proceedings should proceed and the matter be set down for trial, the third party appealed. The judge of first instance allowed the appeal determining that no third party proceedings should ensue in view of the settlement of the plaintiff's claim without admission of liability.

[16] His decision was reversed in the Court of Appeal. The primary issue for consideration there, as is the case here, was the meaning to be accorded to the term 'liability'.

[17] Lord Denning (MR) in dealing with the point considered the English equivalent of our s. 10 (1)(c) of the Civil Law Act in the form of the then Law Reform (Married Women and Tortfeasors) Act 1935 where the words used in relation to contribution by a joint tortfeasor are similar. More specifically he considered the definition to be accorded to the word 'liable' in relation to s. 6(1)(c) of the 1935 Act. He concluded as follows (at p. 656, para. H last line):

> *... I am of opinion that the word 'liable' does mean "responsible in law". It follows that a tortfeasor is entitled to recover contribution from another tortfeasor (i) when he has been held liable in judgment; (ii) when he has admitted liability; and (iii) when he has settled the action by agreeing to make payment to the injured person, even though, in making the settlement he has not admitted liability.* But, of course, when the tortfeasor settles an action he cannot claim contribution from the other tortfeasor unless he proves that he himself was 'liable'. He must prove, therefore, that, if the claim had been fought out, he would have been held responsible in law and liable to pay in whole or in part for the damage. At that subsequent stage, therefore he must admit liability because otherwise he does not bring himself within the section ...

[18] The foregoing case is persuasive authority for the proposition that the word 'liable' ought to be construed so as to include situations where a defendant has been held liable in judgment, has admitted liability or has settled the matter by making payment to the plaintiff even though this is done without an admission of liability.

[19] In the instant case, it is evident from the records of the court that the appellant here not only settled the matter by paying out a sum of RM125,000 to the plaintiff, but entered a consent judgment to that effect. The only 'anomaly' as it were, was the appellant's insistence that the payment was without an admission of liability. However, that does not detract from the fact that the appellant effectively accepted responsibility in law for the loss suffered by the plaintiff, and made good that loss to the extent of RM125,000. To that extent therefore it is clear that he was effectively 'liable' or 'responsible in law' to the plaintiff in that sum of money.

[20] It therefore follows that having accepted such responsibility in law, he is entitled to seek contribution from the respondent third party bank who is another or joint tortfeasor. This is borne out by the decision in Suit 1353 where another judge of the High Court found the respondent third party bank negligent and therefore accountable in damages for all losses suffered by the appellant as a partner of the legal firm of K Siladass & Partners.

[21] For these reasons, we were of the view that the appellant's claim emanating from the second third party proceedings was not extinguished by the settlement reached between the plaintiff and the appellant (qua defendant) whereby the appellant paid a sum of RM125,000 to the plaintiff with no admission of liability by the appellant, and entered into a consent judgment, pursuant to which the plaintiff's claim was withdrawn against the appellant. The appeal was therefore allowed and the order of the High Court in relation to this question in prayer 1(i) of the application under O. 14A set aside.

[22] As a consequence of our decision on this question of law (as explained above) the appellant was entitled to, and was therefore duly granted judgment against the respondent third party bank in terms of the prayers in their third party notice dated 16 May 2013. The parties agreed to costs of RM10,000 to the appellant for proceedings in both the High Court and the appeal. The deposit was refunded.